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CIMB BANK BHD v. GOH AH THIAM

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
AZIZAH NAWAWI JCA
MOHD NAZLAN GHAZALI JCA
B [CIVIL APPEAL NO: P-03(IM)-50-07-2021]
3 MARCH 2023

Abstract – *By successfully instituting third party proceedings, the bank, who had been found liable for breach of duty and negligence, clearly elected to pursue its remedy of indemnity and contribution against third parties in respect of losses and damages payable by it to the claimant. Permitting the bank to raise issues during assessment proceedings involving the injured party would constitute a departure from the established principle that parties in civil litigation are bound by their election. Instead of persisting in its contention that the claimant was not entitled to loss and damages, the bank should execute its claim against the third parties.*

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E ***CONTRACT:*** *Breach – Duty and negligence – Bank acted in breach of undertaking and found to be liable – Whether caused losses to claimant – Whether causation properly determined – Doctrine of res judicata – Whether applicable – Whether parties bound by pleadings – Whether bank elected to pursue remedy of indemnity and contribution against third parties in respect of loss and damages – Determination of assessment of damages – Appropriate quantum for losses suffered*

F

TORT: *Damages – Assessment – Proceedings – Breach – Duty and negligence – Bank acted in breach of undertaking and found to be liable – Whether caused losses to claimant – Whether causation properly determined – Doctrine of res judicata – Whether applicable – Whether parties bound by pleadings – Whether bank elected to pursue remedy of indemnity and contribution against third parties in respect of loss and damages – Determination of assessment of damages – Appropriate quantum for losses suffered*

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This was an appeal against the decision of the Judicial Commissioner ('JC') dismissing the appellant bank's ('appellant') appeal against the Deputy
H Registrar's decision, allowing in full, the respondent's claim after hearing his notice of assessment of damages, in turn based on the judgment delivered by the trial court. In 1998, as security for the appellant making available banking facilities to one Boo Choon Koy ('first third party') and Maggie Gan ('second third party'), three charges under the National Land Code were
I registered over a property ('Agri-Land'). The first and second third parties executed a sale and purchase agreement ('SPA') for the sale of the Agri-Land to Golden Star Dragon Sdn Bhd ('Golden Star'). The respondent was a

director and shareholder of the latter at the material time. Payment of RM400,000 had also been made by Golden Star, as the purchaser, as deposit. However, based on a deed of rescission executed between the same parties to the sale and purchase agreement, the said agreement was mutually rescinded subject to terms, that the Agri-Land shall be instead sold to the respondent with a fresh SPA executed and the deposit sum previously paid by Golden Star credited into the respondent's account as a deposit sum payable for the fresh sale and purchase agreement. This led to the entry of a second SPA by the two third parties as vendors, this time with the respondent as the purchaser, for the sale of the Agri-Land at the purchase price of RM1,116,640. For present purposes, among the two principal conditions of this agreement were: (i) for the respondent to pay the balance purchase price to the vendors' solicitors within 12 months from the date of the agreement, failing which the vendors were entitled to terminate the agreement and forfeit the deposit sum as liquidated damages; and (ii) the purchase price paid under this second agreement was authorised by the vendors to be utilised to redeem the Agri-Land from the appellant with the balance sums (if any) to be paid to the vendors upon completion of the sale. The law firm, Messrs Ooi Weng Hooi & Company ('third third party') who represented the respondent in the sale, wrote to the appellant for a redemption statement recording the amount due under the three charges on the Agri-Land with a letter of indemnity of even date executed by the three third parties. The appellant responded on 14 March 2003 with the requisite letter of undertaking stipulating that upon the respondent settling the full redemption sum of RM478,600 ('redemption sum'), the appellant undertook the usual matters in such transaction. The appellant then received the redemption sum from the respondent through the third third party and subsequently, the appellant delivered to the third third party the original title for the Agri-Land, duplicates of the three charges, the original loan agreement, the two copies of discharge of charge duly executed by the appellant *vide* its power of attorney ('the first discharge of charge'). The first and second third parties, however, initiated legal action against the third third party, the respondent and Golden Star at the High Court ('Suit 631') alleging negligence on the part of the solicitors – the third third party – and sought declarations that the first and second SPAs had lapsed, with the prayers that Golden Star and the respondent be ordered to pay deposits to be forfeited and all caveats entered by the two to be removed. A key development occurred subsequently when the first and second third parties' solicitors, Messrs Teja Singh Penesar & Co, informed the appellant that the first discharge of charge had not been registered. Upon their request, the appellant proceeded to execute another, or a fresh discharge of charge of the Agri-Land ('second discharge of charge'). Crucially, the two third parties applied for and obtained a duplicate title of the Agri-Land and thereafter entered into a third SPA with yet another purchaser, this time with H Sue

A Ee Corporation ('HSE'). The second discharge of charge was registered on 7 July 2006 and the Agri-Land was thus transferred to and registered in the name of HSE. The respondent commenced a writ action against the appellant and six others at the High Court ('Suit 569') contending that the execution of the second discharge of charge by the appellant had facilitated the sale and
B transfer of the Agri-Land by the first and second third parties to HSE. The respondent thus claimed damages suffered due to the breach of the undertaking dated 14 March 2003 by the appellant. As for Suit 631 brought by the two third parties, however, the Deputy Registrar of the High Court entered judgment in default as against the respondent and Golden Star ('JID') ordering, *inter alia*, that the first SPA with Golden Star had lapsed and that
C the second SPA with the respondent had lapsed and for the removal of the caveats entered by the respondent and Golden Star. The respondent's attempts to set aside the JID were not successful. Notwithstanding the JID, the respondent proceeded with his Suit 569 against the appellant, primarily, for the breach of the letter of undertaking and negligence in executing the
D second discharge of charge for the first and second third parties. The respondent obtained summary judgment against the appellant but the Court of Appeal allowed the appellant's appeal and ordered Suit 569 to be remitted to the High Court for trial. At the conclusion of trial of Suit 569, the High Court Judge ('HCJ') ruled for the respondent, allowed his claim against the
E appellant for breach of undertaking and negligence and ordered damages to be assessed ('HC liability judgment'). The appellant's appeal against this part of the HC liability judgment was dismissed by the Court of Appeal and the Federal Court also refused the appellant leave to appeal. In the Suit 569, the appellant initiated third party proceedings against the first and second third
F parties, as well as against the third third party. This claim for indemnity and contribution was premised on the grounds that any loss and damage suffered by the respondent was caused by the act of the third third party and/or the misrepresentation or fraud by the first third party and the second third party. As part of the HC liability judgment, the HCJ allowed the appellant's claim
G against the first and second third parties, but dismissed the appellant's claim against the third third party. The assessment proceedings then followed, after the Deputy Registrar granted an order for directions and subsequent to the respondent filing a notice of assessment of damages pursuant to O. 37 of the Rules of Court 2012, on the basis of the HC liability judgment. The Deputy
H Registrar delivered her decision and ordered, among others, that the appellant pay damages to the respondent. The appeal by the appellant against the decision of the Deputy Registrar was not successful. The JC dismissed the same. Hence, this appeal. The appellant submitted, *inter alia*, that there was judicial misappreciation of the evidence as a whole which according to the appellant saw that complete reliance was made by the JC on the finding
I of liability and specific facts by the trial court to displace the requirement of proof at the assessment proceeding.

Held (dismissing appeal)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) The totality of the pronouncements of the trial and appellate courts in this case was unmistakable in making a number of primary and specific findings. Chief among which was that, the appellant had acted in breach of its undertaking dated 14 March 2003 and was negligent in executing the second discharge of charge for the first and second third parties. Consequently, the appellant was liable to the respondent for breach of duty and negligence. It was also a clear determination that the negligence of the appellant had caused the loss of Agri-Land to the respondent. In addition, the respondent was to have the said loss assessed and quantified against the appellant. The one key finding favourable to the appellant though was that the appellant was to obtain indemnity from the first and second third parties for the loss and damage payable to the respondent. (para 39)

(2) The HCJ in the HC liability judgment clearly had in mind the dispute between the respondent and the two third parties *vis-a-vis* the JID. Still, the final verdict of the High Court was that specific finding on liability of the appellant which caused the loss. The HC liability judgment, as affirmed by the Court of Appeal, and with leave to further appeal to the Federal Court refused, had made specific findings not only on liability against the appellant but also on such infraction by the appellant being the cause of the loss to the respondent of the Agri-Land. The findings could not have been made more clearly and specifically judicially stated, more so, in response to equally unequivocally formulated agreed issues to be tried. On top of that, as leave to appeal to the Federal Court against the HC liability judgment was denied, the said HC liability judgment became final, binding and conclusive. (paras 47-50)

(3) Precisely because of these specific judicial findings, including on liability and causation, the doctrine of *res judicata* would apply and prevent re-litigation of the same. The issues raised by the appellant could not therefore succeed because they were barred by *res judicata*. It is well settled in local jurisprudence that the principle of *res judicata* is even of wider remit, and extend to matters which are part of the subject matter of a litigation which ought to have been raised even if not actually raised to be determined, due either to inadvertence or by conscious design. In this case, the relevant issues had in fact been raised and adjudicated upon. *Res judicata* would be in relation to the key issues on liability and causation, being the very issues of dispute between the parties which had been raised and adjudicated on in the liability proceedings, and now attempted to be repeated in this appeal concerning the assessment proceedings. Herein, *res judicata* applied equally to the two stages of the case – liability and later the consequential assessment

of damages proceedings – with the result that the appellant must now be estopped from raising issues concerning the JID *vis-a-vis* the specific findings made earlier in the HC liability judgment. (paras 51, 55 & 58)

(4) The complaint of the appellant that the HCJ in the liability trial and the JC in the subsequent assessment proceeding did not consider the implications of the JID against the respondent to justify the findings on liability and causation against the appellant was lacking in merit because this particular defence of the appellant was not even pleaded in the appellant's statement of defence. The appellant did not plead in its defence any issues relating to the Suit 631 and the resultant JID, let alone touch on the alleged effect of the JID in extinguishing the rights and interest of the respondent to the Agri-Land. Parties are bound by their pleadings and cannot adduce facts and issues which are not pleaded. As such, the JC was correct in arriving at the decision because it was never pleaded in the liability trial in the first place, the appellant could not now in the assessment proceeding raise the defence concerning the JID against the respondent. (paras 59, 60, 62 & 66)

(5) The aspect concerning the successful third-party proceeding instituted by the appellant against the first and second third parties for indemnity from the two third parties for the loss and damage payable by the appellant to the respondent, was consistent with the defence proffered by the appellant in the High Court liability judgment that any loss to the respondent was caused by the representations by the two third parties. This would manifestly completely answer the case of the appellant. The appellant had, by pursuing the third-party action, clearly elected to pursue its remedy of indemnity and contribution against the first third party and the second third party in respect of any loss and damage which the appellant was found liable to the respondent. Therefore, instead of persisting in its contention that the respondent was not entitled to the loss of the Agri-Land which was allowed by the courts, the appellant should proceed to execute its claim against the third parties. (paras 67-70)

(6) The execution of the second discharge of charge was held by the High Court to be the effective cause of the loss of the Agri-Land to the respondent, consistent with the pleaded case of the respondent, which was affirmed by the Court of Appeal. This plainly – and crucially – encompassed the fact of damage and the extent of which being the loss of the Agri-Land – which were as such already proved by the respondent. What was still pending therefore and left for determination at the assessment of damages proceeding was the quantum of such loss – the loss of the Agri-Land – suffered by the respondent. The JC had awarded, *inter alia*, RM5,583,000 as damages and held that the open market value of the Agri-Land was the appropriate quantum for the loss

of the respondent and the date of assessment was the date of the judgment of the High Court liability judgment. There was no flaw in the approach taken by the JC of preferring the valuation reports of the respondent to that of the appellant principally by reason of the greater granularity demonstrated in the analysis of how the market value was determined in these reports, which exhibited sufficient bases with the necessary adjustments *vis-a-vis* the key considerations of date, size and location of the pertinent comparable in respect of the Agri-Land. In light of the judgment that the appellant was liable to the respondent for the loss of the Agri-Land, the JC was correct in holding that what was left for the determination at the assessment of damages, was the quantum of such loss suffered by the respondent, namely the loss of the Agri-Land. Hence, the assessment was with regard to the amount of damages the respondent suffered from the loss of the Agri-Land. The JC was not in error in holding that the open market value of the Agri-Land on judgment date would be the appropriate quantum for the loss suffered by the respondent. (paras 76-95)

Case(s) referred to:

AEON Co (M) Bhd v. Asia Plywood Company Sdn Bhd & Another Appeal [2021] 5 CLJ 751 CA ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2014] 7 CLJ 461 CA ***(refd)***

Bonham Carter v. Hyde Park Hotel [1948] TLR 177 ***(refd)***

Chong Nge Wei & Ors v. Kemajuan Masteron Sdn Bhd [2022] 4 CLJ 833 FC ***(ovrd)***

Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA ***(refd)***

Dato' Sivanathan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Giga Engineering & Constructions Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Sdn Bhd [1996] 2 CLJ 104 CA ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Huawei Tech Investment Co Ltd v. Transition Systems (M) Sdn Bhd [2013] 1 LNS 329 CA ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Joseph Paulus Lantip v. Tnio Chee Chang & Another Appeal [2020] 4 CLJ 79 CA ***(refd)***

Kemajuan Masteron Sdn Bhd v. Chong Nge Wei & Ors [2020] 1 LNS 468 CA ***(refd)***

Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***

Lee Tai Hoo & Anor v. Lee Swee Keat & Anor [1984] 1 LNS 44 HC ***(refd)***

Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd [2017] 5 CLJ 150 CA ***(refd)***

Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***

Nancy Simon SP Simon v. Peninsular Park Sdn Bhd [2008] 10 CLJ 328 HC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

A *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA* ***(refd)***
Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(foll)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271 FC ***(refd)***
B *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor [2019] 3 CLJ 157 FC* ***(foll)***
Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

Legislation referred to:
C Rules of Court 2012, O. 37

For the appellant - Jeyanthini Kannaperan, Sharon Jessy, Nurul Ishtar Ismail & Jeyasingam Balasingam; M/s Ghazi & Lim
For the respondent - Tung Mun Yeong & Chan Sean Keong; M/s Tung Chan & Partners

[Editor's note: For the High Court judgment, please see Goh Ah Thiam v. CIMB Bank Bhd; Boo Choon Kooy (Third Parties) [2021] 1 LNS 1519 (affirmed).]
D

Reported by Suhainah Wahiduddin

JUDGMENT

E **Mohd Nazlan Ghazali JCA:**

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner ("the JC") of the High Court on 2 June 2021 dismissing the appellant bank's appeal against the Deputy Registrar's decision of 18 December 2020, which had allowed in full, the respondent's claim after hearing his notice of assessment of damages dated 22 August 2019, in turn based on the judgment of 9 November 2015 delivered by the trial court.
F

[2] The underlying claim of the respondent against the appellant was for the latter's breach of an undertaking and negligence in executing a discharge of charge which facilitated the transfer of a piece of property to a third party, which caused a loss to the respondent.
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[3] Having heard the appeal, examined the appeal records and considered the submissions by parties, we decided to dismiss the appeal and affirmed the decision of the High Court. These grounds of judgment contain the full reasons for our decision.
H

Key Background Facts

[4] This instant appeal before us is thus concerned with the assessment proceedings, which must plainly follow from the findings made in the liability proceedings. In order to better appreciate the entire case, it is useful for the background facts concerning both proceedings be set out, *albeit* in summary fashion.
I

[5] Way back in 1998, as security for the appellant making available banking facilities to one Boo Choon Koy ("the first third party") and Maggie Gan ("the second third party"), three charges under the National Land Code were registered over a property known as Lot No. 1710, Mukim 16, Daerah Seberang Perai Tengah ("the Agri-Land"). The first and second third parties in 2001 executed a sale and purchase agreement for the sale of the Agri-Land to Golden Star Dragon Sdn Bhd ("Golder Star"). The respondent was a director and shareholder of the latter at the material time. Payment of RM400,000 had also been made by Golden Star as the purchaser as deposit.

[6] However in the year after, based on a deed of rescission dated 30 July 2002 executed between same parties to the sale and purchase agreement, the said agreement was mutually rescinded subject to the terms *inter alia* that the Agri-Land shall be instead sold to the respondent with a fresh sale and purchase agreement executed and the deposit sum previously paid by Golden Star credited into the respondent's account as deposit sum payable for the fresh sale and purchase agreement.

[7] This led to the entry of a second sale and purchase agreement by the two third parties as vendors, this time with the respondent as the purchaser, for the sale of the Agri-Land at the purchase price of RM1,116,640. For present purposes, among the two principal conditions of this agreement were firstly, for the respondent to pay the balance purchase price to the vendors' solicitors within 12 months from the date of the agreement, failing which the vendors were entitled to terminate the agreement and forfeit the deposit sum as liquidated damages. Secondly, the purchase price paid under this second agreement was authorised by the vendors to be utilised to redeem the Agri-Land from the appellant bank with the balance sums (if any) to be paid to the vendors upon completion of the sale.

[8] We pause here to state that it is standard banking practice, as typically reflected in legal documentation that one common scenario is that a purchaser makes payment of purchase price towards redeeming the land charge for the loan taken by the vendor over the subject property. The end result is usually for the charge to be discharged by the first financier upon receipt of payment of the redemption sum (and other balance payment) from the purchaser, and for the subject property to be registered in the name of the purchaser together with a new charge in favour of another financier if the purchaser obtains a loan from the financier.

[9] The law firm, Messrs Ooi Weng Hooi & Company ("third third party") who represented the respondent in the sale, wrote to the appellant bank on 27 February 2003 for a redemption statement recording the amount due under the three charges as at 31 March 2003 on the Agri-Land with a letter of indemnity of even date executed by the three third parties enclosed therein. The appellant responded on 14 March 2003 with the requisite letter of undertaking stipulating that upon the respondent settling the full

redemption sum of RM478,600 ("the redemption sum"), the appellant bank undertook the usual matters in such transaction – which were to execute the discharge of charge on the Agri-Land, forward the original title of the Agri-Land and duplicate charges, together with the duly executed discharge of charge, and to refund the redemption sum paid in the event that the discharge could not be registered for any reason whatsoever attributable to the appellant bank, provided that the aforesaid documents were first returned intact.

[10] The appellant bank then received the redemption sum from the respondent through the third third party's letter of 31 March 2003. On 15 April 2003, the appellant delivered to the third third party the original title for the Agri-Land, duplicates of the three charges, the original loan agreement dated 2 February 1996, and two copies of discharge of charge duly executed by the appellant bank *vide* its power of attorney ("the first discharge of charge"). Later in November in 2003 however, the first and second third parties initiated legal action against the third third party, the respondent and Golder Star at the Penang High Court ("Suit 631") alleging negligence on the part of the solicitors – the third third party – and seeking declarations that the first and second sale and purchase agreements had lapsed, with the prayers that Golder Star and the respondent be ordered to pay deposits to be forfeited and all caveats entered by the two to be removed.

[11] A key development occurred on 5 June 2006 when the first and second third parties' solicitors, Messrs Teja Singh Penesar & Co informed the appellant bank that the first discharge of charge had not been registered. Upon their request, the appellant proceeded to execute another, or a fresh discharge of charge of the Agri-Land ("the second discharge of charge"). Crucially, the two third parties applied for and obtained a duplicate title of the Agri-Land and thereafter entered into a third sale and purchase agreement with yet another purchaser, this time with H. Sue Ee Corporation Sdn Bhd ("HSE"). The second discharge of charge was registered on 7 July 2006 and the Agri-Land was thus transferred to and registered in the name of HSE.

[12] Only on 27 August 2009 that the respondent commenced a writ action against the appellant and six others at the Penang High Court ("Suit 569"). The respondent contended that the execution of the second discharge of charge by the appellant had facilitated the sale and transfer of the Agri-Land by the first and second third parties to HSE. The respondent thus claimed damages suffered due to the breach of the undertaking dated 14 March 2003 by the appellant.

[13] As for Suit 631 brought by the two third parties however, on 19 May 2010, the Deputy Registrar of the High Court entered judgment in default as against the respondent and Golden Star ("the JID"), ordering that the first sale and purchase agreement with Golder Star had lapsed on 1 August 2002,

that the second sale and purchase agreement with the respondent had lapsed on 30 July 2003, the removal of the caveats entered by the respondent and Golden Star; Golden Star to return the sum of RM400,000 being the deposit subject to the forfeiture clause, and the respondent to return the RM600,000 being the deposit subject to the forfeiture clause under the two agreements respectively. The redemption sum and an additional RM100,000 previously paid to the two third parties as vendors were accounted for, leaving a balance of RM400 to be paid at an interest of 8% per annum.

[14] The respondent's attempts to set aside the JID were not successful. The High Court refused his application on 29 November 2010 and the Court of Appeal on 25 November 2011 dismissed his appeal against that decision.

[15] Notwithstanding the JID, the respondent proceeded with his Suit 569, as the plaintiff, against the appellant bank primarily for breach of the letter of undertaking and negligence in executing the second discharge of charge for the first and second third parties, but the respondent withdrew his claim against the other defendants. The respondent obtained summary judgment against the appellant but the Court of Appeal allowed the appellant's appeal on 31 May 2012 and ordered the Suit 569 remitted to the High Court for trial.

[16] At the conclusion of the trial of Suit 569, the learned High Court Judge ("the HCJ") on 9 November 2015 ruled for the respondent, allowed his claim against the appellant for breach of undertaking and negligence and ordered damages to be assessed. In addition, interest of 4% per annum on the assessed damages from the date of filing of the writ and further interest of 5% per annum from the date of judgment till full settlement was also ordered, in addition to costs of RM50,000 to the respondent ("the High Court liability judgment").

[17] The appellant bank's appeal against this part of the High Court liability judgment was dismissed by the Court of Appeal with costs of RM10,000 on 28 April 2016. Subsequently on 29 April 2019, the Federal Court also refused the appellant leave to appeal to the Federal Court, with costs of RM10,000 to the respondent.

[18] It is apposite that it be highlighted that in the same Suit 569, the appellant as the defendant had initiated third party proceedings against the first (Boo Choon Koy) and second (Maggie Gan) third parties, as well as against the third third party (the solicitors, Messrs Ooi Weng Hooi & Company). This claim for indemnity and contribution was premised on the grounds that any loss and damage suffered by the respondent was caused by the act of the third third party and/or the misrepresentation or fraud by the first third party and the second third party. As part of the High Court liability judgment, the learned HCJ allowed the appellant's claim against the first and second third parties, ordered them to fully indemnify the appellant bank of its liability, damages and costs, together with the costs of RM50,000

to be paid by them in favour of the appellant. However, the High Court dismissed the appellant's claim against the third third party with costs of RM30,000 to be paid to the latter.

[19] The assessment proceedings then followed, after the Deputy Registrar granted an order for directions, and subsequent to the respondent filing a notice of assessment of damages dated 22 August 2019 pursuant to O. 37 of the Rules of Court 2012, on the basis of the High Court liability judgment. The appellant also applied and managed to cross-examine the respondent and one Ho Yoke Teng, the deponent of the appellant's affidavit filed in that proceedings, which examination proceeded before the Deputy Registrar.

[20] On 18 December 2020, the learned Deputy Registrar delivered her decision which ordered, among others, that the appellant to pay the respondent the following:

(i) RM5,583,000 as damages, together with pre-judgment interest at 4% on the said RM5,583,000 calculated from 27 August 2009 (date of the writ) until 9 November 2015 (date of judgment);

(ii) post-judgment interest at 5% on the said RM5,583,000 calculated from 9 November 2015 (date of judgment) until full and final settlement;

(iii) RM28,500 as special damages being the costs for preparing the valuation report; and

(iv) costs of RM5,000 subject to allocator fee.

[21] The appeal by the appellant bank against the decision of the Deputy Registrar to the judge in chambers was also not successful. On 2 June 2021, the learned Judicial Commissioner of the High Court ("JC") dismissed the same with costs of RM10,000.

[22] It is this decision of the learned JC which is the subject matter of this appeal before us.

Principles Of Appellate Intervention

[23] The key essence of appellate intervention is well-established. It is to ascertain whether or not the trial court had arrived at its decision or finding correctly on the evidence and on the basis of the governing law. The law is trite in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:

[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[24] In a more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

[25] Another facet to appellate intervention relevant to the instant case is the fact that the Deputy Registrar's findings on the evidence before her during the assessment of damages have been affirmed by the learned JC. Thus, this appeal is against concurrent findings of fact where the general principle in this context is that the Court of Appeal should not go into the concurrent findings of fact save in exceptional circumstances. In *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12, also a case involving a decision of a registrar at an assessment proceeding which was later appealed to the judge in chambers, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said this:

> How then should we approach the present appeal? In our judgment, we ought not any longer to treat a case as the present instance as one emanating from the judge alone. It is our judgment that this is essentially an appeal against concurrent findings of fact. The registrar made her findings on the evidence before her and came to certain conclusions. The learned judge has agreed with those conclusions. The defendant therefore begins with a singular disadvantage before us. For, it is a general principle upon which this court acts that save in most exceptional circumstances, concurrent findings of fact will not be gone into by us. But that is not to say that an appeal of this nature will never succeed. If an appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred at both the lower tiers of the High Court, this court will have no hesitation; and indeed we are duty bound; to correct the resultant error.

A **Main Grounds Of Appeal**

[26] The essence of the appeal, as submitted by the appellant is that an evaluation of the learned JC's grounds of judgment will show that the learned JC did not judicially appreciate the undisputed documentary and oral evidence presented to the court, making inference of fact which could not be
B drawn from the evidence presented to him, thus resulting in a decision that was plainly wrong.

[27] It was contended that the learned JC misconstrued the appellant's position at the assessment proceeding. The appellant's key argument is that the scope of trial on liability does not extend to causation of loss for purposes
C of establishing damage, and that findings made thereat does not give rise to estoppel. There was also a complaint against the learned JC's alleged failure to draw distinction between a finding on causation for liability and application of causative principles for damages. The appellant's case is that, there was no longer any causation or causal link as at the appellant's breach
D on its execution of the second discharge of charge on 7 July 2006.

[28] In other words, there was judicial misappreciation of the evidence as a whole which according to the appellant saw that complete reliance was made by the learned JC on the finding of liability and specific facts by the trial court to displace the requirement of proof at the assessment proceeding.
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[29] Each of these principal grounds of appeal will be examined next.

Analysis And Finding Of This Court

Key Contentions Of The Parties

F **[30]** The appellant's position has always been that it had discharged its obligations under the undertaking dated 14 March 2003 by delivering the relevant documents, including the original title to the Agri-Land, as mentioned above, to the third third party, namely the solicitors who represented the respondent for the purchase of the Agri-Land. In addition it
G was also the defence of the appellant that the respondent was guilty, of contributory negligence by reason of the fact that he had failed first, to register the first discharge of charge; secondly, to inform the appellant of its non-registration; thirdly, to enter a caveat against and/or maintain a caveat on the Agri-Land; fourthly to register the transfer of the Agri-Land.

H **[31]** The appellant's position was also that the respondent did not suffer any loss because he did not complete the sale under the second agreement which had been declared as having lapsed. If at all, the appellant should only be liable for the sum of RM478,600 which was the sum of monies paid by the respondent in reliance on the letter of undertaking dated 14 March 2003
I which had been found to have been breached by the appellant in the High Court liability judgment.

[32] The appellant disagreed with the learned JC's determination that the appellant's stance that the respondent was not entitled to the loss of the Agri-Land to be an afterthought since according to the appellant this was not consistent with the pleadings of the appellant who as the defendant, had stated (in para. 14 of the amended defence) that damages are denied, where the respondent as plaintiff, was put to strict proof of the same, and that such loss if any was due to the conduct of the third third party or to the representations made by the first and second third parties. In other words, its pleadings did not disclose any admission as to loss or damages and the respondent was always subject to proof of the same.

[33] As per its memorandum of appeal, the appellant thus asserted that the learned JC had erred in fact and in law by failing to consider that the respondent did not discharge his burden of proving that the loss of Agri-Land was attributable to the negligence of the appellant.

[34] The respondent on the other hand submitted that the complaint by the appellant had already been dealt with by the specific findings of the trial court in the High Court liability judgment. The doctrine of *res judicata* applied and the appellant must be estopped from trying to relitigate the issue.

Parties Agreed On Issues To Be Tried And Courts Made Specific Findings Thereon

[35] Having examined the evidence and the record of the earlier proceedings, we cannot but agree with the respondent. We observe that to start with the specific questions of relevance had prior to the commencement of trial on liability, been formulated as amongst the agreed issues to be tried. These as appearing in the agreed issues to be tried included:

1) Whether the Defendant had acted in breach of the Undertaking dated 14-3-2003 by executing the 2nd Discharge of Charge for PK 1 and PK 2 which facilitated the transfer of the Agri-Land to the said Company?

2) Whether the Defendant was negligent by executing the 2nd Discharge of Charge for PK 1 and PK 2 when the documents stated in the Undertaking dated 14-3-2003 had been delivered to PK 3 on 15-4-2003 after the payment of the redemption sum for the Agri-Land by the Plaintiff?

3) Whether the Plaintiff had suffered loss and damage because of the execution of the 2nd Discharge of Charge for PK 1 and PK 2 by the Defendant?

[36] It is equally clear that the answers to these questions after the conclusion of trial was a resounding "yes" to each of the three issues to be tried. The appellant was held by the learned HCJ in the High Court liability proceedings to be liable to the respondent and that the negligence of the appellant had caused the loss of the Agri-Land to the respondent. We can

therefore do no better than reproducing the relevant passages in the grounds of the judgment of the learned HCJ in the High Court liability proceedings to demonstrate the same, as follows:

> 42. It is undisputed that the undertaking of D13 by the defendant is addressed and given to the plaintiff and not to PK1 and PK2. The payment towards the full redemption of the charge is also made by the plaintiff and not by PK1 and PK2. The first discharge of charge, the original title of the Agri-Land were also forwarded to the plaintiff by way of the letter dated 15.4.2003 (exh P8). *The defendant contends that its obligation and duty under D13 had ended on 15.4.2003. Yes, I would have agreed with it, had the defendant did just that. But here, as undisputed the defendant proceeded to execute the second discharge of charge and handed it to the solicitor for PK1 and PK2, whereas its undertaking to the plaintiff does not provide for a subsequent re-execution of the discharge of charge and the delivery of the same to another party other than the plaintiff.* It is salutary to remember the execution of the second discharge of charge is in respect of the settlement of the same redemption sum and the same Agri-Land.
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> …
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> 48. … So, here *had the defendant made the necessary inquiry with PK3 and in respect of D36 with the defendant's own legal department, the defendant would have discovered the plaintiff's right and claim over the Agri-Land.*
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> 49. *The failure of the SD1 and SD2 to verify from PK 3 to my mind clearly shows that the defendant was negligent and acted in breach of its duty towards the plaintiff.* The explanation by SD1 and SD2 that they were then not in the possession of the relevant physical files on the Agri-Land would not excuse them to verify from PK3 about the 1st discharge of the charge when Messrs Teja Singh's letter (exh D28) is clearly of self-explanatory about PK3 having fail to register the first discharge of charge.
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> 50. *PK3 in his testimony said that he had decided not to register the discharge despite having received the fully executed relevant documents from the defendant in favour of letting the Agri-Land remain encumbered to serve as an added security in addition to the caveat for the plaintiff pending resolution of the ongoing dispute between the plaintiff and PK1 and PK2.* The Defendant contended that PK3's refusal to immediately register the said discharge had contributed towards the execution of the second discharge of charge. It goes without saying, had it been registered earlier, the question of the defendant executing the second discharge of the charge would not have occurred. But while, it is not the term in D13 which requires PK3 to register the said discharge immediately and to inform the defendant of the same, the law seeks the *causa causans* (effective factor) rather than the *causa sine qua*. In the case of *Wu Siew Ying v. Gunung Tunggul Quarry & Construction Sdn Bhd* (1999) 4 CLJ 339, the court has adopted the principle of the test of causation the "but for" test in *Clerk & Lindsell on Torts* 17th edition 1995 as follows:
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> …

51. Now, for more than 3 years despite the first discharge of charge was not registered *and despite the dispute between the plaintif and PK1 and PK2 with regard to the sale and purchase of Agri-Land* which caused the registration of the transfer of it be kept in abeyance, the status of said Agri-Land remains encumbered. *It is only when the defendant had executed the second discharge of charge that it had resulted in the Agri-Land becoming unencumbered and subsequently transferred to the third party, causing loss and damage to the plaintiff. In the circumstances, I agree with the plaintiff's submission that it was the act of the defendant in negligently executing the second discharge of charge being the effective cause for the loss of the Agri-Land by the Plaintiff.* However, on the evidence available this court is not prepared to find that the defendant had conspired together with PK1 and PK2 in executing the said second discharge of charge.

…

53. For the aforesaid reasons, this court answers the issues between the plaintiff and defendant of *(1) and (2) (3) respectively in the affirmative and (4) and (5) respectively in the negative.* …

In the circumstances, *I am giving my judgment for the plaintiff against the defendant as per amended prayer:*

(a) *Damages for the breach of undertaking and negligence to be assessed by the SAR*; … (emphasis added)

[37] For completeness, we should add that the fourth and fifth agreed issues to be tried which as shown above were answered in the negative are as follows:

4) In the event the Plaintiff had suffered loss and damage, whether the Plaintiff was guilty of contributory negligence in respect of the loss and damage?

5) Whether the Defendant was under a duty to execute the 2nd Discharge of Charge for PK 1 and PK 2 when the Agri-Land had been fully redeemed?

[38] We hardly need to repeat that the decision of the learned HCJ was affirmed by the Court of Appeal and leave to appeal to the Federal Court was refused. As correctly submitted by the respondent, the grounds of judgment of the Court of Appeal also contained the following finding:

47.8 … *the transfer of the Agri-Land to H.Sue Ee pursuant to the 2nd SPA could not have occurred but for CIMB's breach of duty in executing the 2nd Discharge of Charge and consequentially "but for" the same Goh's loss of the Agri-Land would not have occurred.* We noted the law of tort of negligence as espoused by the learned authors in Clerk and Lindsell on Torts 17th edition, 1995, at pages 45 and 46, as follows: … (emphasis added)

[39] As such, we find that the totality of the pronouncements of the trial and appellate courts in this case is unmistakable in making a number of primary and specific findings. Chief among which is that, the appellant had acted in breach of its undertaking dated 14 March 2003 and was negligent

A in executing the second discharge of charge for the first and second third parties. Consequently, the appellant was therefore liable to the respondent for breach of duty and negligence. It was also a clear determination that the negligence of the appellant had caused the loss of Agri-Land to the respondent. In addition, the respondent was to have the said loss assessed and
B quantified against the appellant. The one key finding favourable to the appellant though was that the appellant was to obtain indemnity from the first third party and the second third party for the loss and damage payable to the respondent.

Whether Causation Was Properly Determined And Consideration On The
C *Judgment In Default*

[40] Notwithstanding these specific findings, the appellant submitted before us, as it did before the Deputy Registrar and the learned JC earlier, that the issue of causation – as to whether the breach had caused the loss of the Agri-Land, despite the relevant sale and purchase agreements having
D lapsed, was not expressly dealt with by the trial court in the liability proceedings.

[41] The appellant argued that the learned HCJ in the High Court liability judgment did not consider the evidence or the implications concerning Suit 613 and the resultant JID against the respondent. According to the appellant,
E the JID (which as stated earlier declared that the agreement entered into by the respondent with the first and second third parties on the purchase of the Agri-Land had lapsed) had the effect of extinguishing the respondent's rights and/or interest over the Agri-Land. Because of this stance, the appellant continued to contend that the respondent remained liable to prove the fact
F of the loss and the causal link between the appellant's breach of the letter of undertaking (and negligence), and the respondent's alleged loss of the Agri-Land.

[42] Not only that, much was further made by the appellant of the learned
G JC's alleged failure to draw the distinction between a finding that contemplates loss and the issue of determining the nexus of that loss to damages payable at assessment. The appellant emphasised that the courts have consistently recognised the relevance of causation at assessment stage with the claiming party still bearing the burden to prove that the damage or loss claimed was caused by or attributable to the paying party. Cases such
H as *Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd* [2017] 5 CLJ 150, *Joseph Paulus Lantip v. Tnio Chee Chang & Another Appeal* [2020] 4 CLJ 79; [2020] 5 MLJ 708, and *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174 were referred to in support.

I **[43]** Arguments were also posited by the appellant to the effect that the respondent's claim, taken at its highest only amounted to bare averments since there is no evidence that the sale and purchase agreement to which he was party ever become enforceable, and that a void contract does not generate any enforceable right.

[44] Further, it was also asserted that even upon the finding of liability on 9 November 2015, the respondent did not have a right to the Agri-Land by 30 July 2003 such that it was impossible for him to show that the appellant's act of executing the second discharge of charge had resulted in the loss of the Agri-Land to the respondent because the said agreement was invalid and unenforceable by 30 July 2003 when the appellant's execution of the second discharge of charge took place on 7 July 2006, subsequent to 30 July 2003.

[45] We are of the view that this position of the appellant is not tenable. We say so for a number of reasons.

[46] First, the learned HCJ in the High Court liability judgment did in fact consider the JID. As stated in the opening sentence in para. 51 of the learned HCJ's grounds of judgment as set out above, "… despite the dispute between the plaintiff and PK1 and PK2 with regard to the sale and purchase of Agri-Land …".

[47] This was followed with the conclusion that the appellant was liable for negligence which caused the loss of the Agri-Land to the respondent. It can thus be said that the learned HCJ in the High Court liability judgment clearly had in mind the dispute between the respondent and the two third parties *vis-à-vis* the JID. Still the final verdict of the High Court was that specific finding on liability of the appellant which caused the loss.

[48] Secondly, we cannot emphasise enough that the High Court liability judgment, as affirmed by the Court of Appeal, and with leave to further appeal to the Federal Court refused, had made, as we have highlighted earlier, specific findings not only on liability against the appellant but also on such infraction by the appellant being the cause of the loss to the respondent of the Agri-Land. At the glaring risk of repetition, we stress that the learned HCJ stated in para. 51 (as mentioned above) that "… it was the act of the defendant in negligently executing the second discharge of charge being the effective cause for the loss of the Agri-Land by the plaintiff. …"

[49] In a relatively recent decision in *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor* [2019] 3 CLJ 157, the Federal Court in approvingly referring to Spencer Bower and Turner, *Res Judicata,* 3rd edn (1996) said this:

> [35] The learned authors further stated that the determination must not be collateral to the decision and for this one has to look at the formal judgment or order. Where an express declaration as to any particular question or issue appears on the face of the record of a formal judgment or where from the judgment itself the actual grounds of the decision can be clearly ascertained, there is no necessity for further search.

[50] This, as can be readily appreciated is exactly the situation in the instant case before us. The findings could not have been more clearly and specifically judicially stated, more so in response to equally unequivocally formulated agreed issues to be tried. On top of that, as leave to appeal to the

Federal Court against the High Court liability judgment was denied, the said High Court liability judgment became final, binding and conclusive (see: Federal Court decision in *Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd* [2018] 6 CLJ 271).

[51] Thirdly, precisely because of these specific judicial findings, including on liability and causation, the doctrine of *res judicata* would apply and prevent re-litigation of the same. This is of course also trite law. The issues raised by the appellant cannot therefore succeed because they are barred by *res judicata*. In fact, it is well settled in local jurisprudence that the principle of *res judicata* is even of wider remit, and extends to matters which are part of the subject matter of a litigation which ought to have been raised even if not actually raised to be determined, due either to inadvertence or by conscious design. In this case before us, the relevant issues had in fact been raised and adjudicated upon.

[52] The Supreme Court made it clear in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 that there are two kinds of estoppel per *rem judicatum*, namely cause of action estoppel and issue estoppel. The scope of the plea of *res judicata* was clarified in the head notes of the case, as reported, in the following terms:

> [1] The significance of *res judicata* lies in its effect of creating an estoppel per *rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
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> [2] The doctrine of *res judicata* is not confined to causes of action or issues which the Court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[53] The Supreme Court referred to and applied the following common law principles in its exposition of the scope of the doctrine of *res judicata*. First, the passage by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p 115 which reads:-

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[54] In addition, the meaning of the words in the said above statement, namely "every point which properly belonged to the subject of litigation" was explained by Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p. 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[55] There are a number of other local cases which have since followed this principle (see *Huawei Tech Investment Co. Ltd. v. Transition Systems (M) Sdn Bhd* [2013] 1 LNS 329; [2013] 5 MLJ 396 and *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534). However, it is crystal clear in this instant case before us that *res judicata* would be in relation to the key issues on liability and causation, being the very issues of dispute between the parties which had been raised and adjudicated on in the liability proceedings, and now attempted to be repeated before us in this appeal concerning the assessment proceedings.

[56] Hence here, there is no necessity to even rely on the wider sense of *res judicata* as referred to by the leading Federal Court decision in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189.

[57] In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Sdn Bhd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, it was held that *res judicata* applies not only in the context of between past litigation and future litigation, with the result that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. It also is relevant as between two stages in the same litigation such that a decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit (or in a subsequent suit), such that a failure to adhere may lead to chaos in the conduct of civil proceedings. Gopal Sri Ram JCA (as he then was) in a much-quoted observation said:

> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.

[58] The learned JC was therefore correct in holding that *res judicata* applied equally to the two stages of the case – liability and later the consequential assessment of damages proceedings – with the result that the appellant must now be estopped from raising issues concerning the JID *vis-à-vis* the specific findings made earlier in the High Court liability judgment.

[59] Fourthly, we also determine that the complaint of the appellant that the learned HCJ in the liability trial and the learned JC in the subsequent assessment proceeding did not consider the implications of the JID against the respondent to justify the findings on liability and causation against the appellant to be lacking in merit because this particular defence of the appellant was not even pleaded in the appellant's statement of defence.

[60] The appellant did not plead in its defence any issues relating to the Suit 631 and the resultant JID, let alone touch on the alleged effect of the JID in extinguishing the right and interest of the respondent to the Agri-Land.

[61] As stated earlier, and at the risk of repetition, the key defence of the appellant as pleaded was that, it had discharged its obligations under the undertaking; it was instead the respondent who was guilty of contributory negligence by reason of the fact that he had failed among others to register the first discharge of charge and the transfer of the Agri-Land; and that such loss if any was due to the conduct of the third third party or to the representations made by the first and second third parties. Moreover and as stated earlier, even the specific agreed issues to be tried by the trial court on liability did not encompass matters pertaining to the JID.

[62] It hardly needs emphasising that it is trite law that parties are bound by their pleadings and cannot adduce facts and issues which are not pleaded. Yet, it is imperative that the relevant judicial pronouncement to such effect be highlighted, for the critical importance of parties and the court to be bound by the four corners of the pleadings of the litigants has been emphasised many a times by various judicial pronouncements of the highest authority. We are reminded by these relevant passages from three relatively recent decisions by the apex court on this issue.

[63] In the Federal Court decision in the case of *Giga Engineering & Constructions Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537, Richard Malanjum CJ (Sabah & Sarawak) (later Chief Justice) held thus:

> [42] Now, it is trite law that the plaintiff is bound by its own pleadings. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302 SC; *Joo Chin Kia v. Loh Seng Tek* [1987] 1 CLJ 194; [1987] CLJ (Rep) 662; *KEP Mohamed Ali v. KEP Mohamad Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10 FC). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place. (See *Esso Petroleum Co Ltd v. South Port Corp* [1956] AC 218; *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] 1 LNS 57; [1980] 2 MLJ 182 FC).

[64] In another Federal Court decision in *Samuel Naik Siang Ting v. Public Bhd* [2015] 8 CLJ 944, Ramly Ali FCJ held instructively as follows: A

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment." B
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> [30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC). C
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> [31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157, had also pointed out that "as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered" (see also: *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26; [1956] MLJ 45; and *Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1963] 1 LNS 59; [1964] MLJ 99). D E
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> …
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> [33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case. F
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> [34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357, "… once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an un-pleaded case …" G

[65] And in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292, Abu Samah Nordin FCJ on the same issue made the point that a decision based on an un-pleaded issue is liable to be set aside, as follows: H

> [29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v. Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan* I

A *Leong v. Lai Kok Chye* [1990] 2 MLJ 152. In *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

B **[66]** As such, the learned JC was therefore correct in arriving at the decision that because it was never pleaded in the liability trial in the first place, the appellant could not now in the assessment proceeding raise the defence concerning the JID against the respondent.

[67] Fifthly, is the aspect concerning the successful third party proceeding C instituted by the appellant against the first and second third parties for indemnity from the two third parties for the loss and damage payable by the appellant to the respondent, consistent with the defence proffered by the appellant in the High Court liability judgment that any loss to the respondent was caused by the representations by the two third parties.

D **[68]** This, in our view would manifestly completely answer the case of the appellant. This is because the appellant had by pursuing the third-party action clearly elected to pursue its remedy of indemnity and contribution against the first third party and the second third party in respect of any loss and damage which the appellant was found liable to the respondent.

E **[69]** In a Court of Appeal decision in *Dato' Sivanathan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062 – a case referred to by the respondent – reference was made to this doctrine of election, as follows:

> [17] HTF had elected to commence the HTF suit against Cosmotine F which ended with the summary judgment being recorded. The continuation of these proceedings against the appellant has clearly violated the doctrine of election, the concept which is ingrained in our legal system and common law that an individual can either opt for the choice of remedies or relinquish it. *It is trite law and, indeed, a fundamental tenet of law that where a person has determined to follow one of his remedies and* G *has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further* (see the House of Lords decision in *Benjamin Scarf v. Alfred George Jardine* (1881-82) 7 Appeal Cases 345).
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> [18] The options which were available to HTF and the respondent were H either:
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> (a) an action by the respondent against the appellant and KAH for the purported breach of the agreement as in the present appeal; or
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> (b) an action in the HTF suit by HTF against Cosmotine following the dishonour of the cheque,

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for the recovery of the sum of RM2.3 million. *The respondent should go no further after the summary judgment was recorded as that was the choice for remedies it had made. It should not be allowed to make a further claim for the said sum based on the breach of contract, a remedy from which it is precluded by virtue of the election.* (emphasis added)

[70] As such, the denial by the learned JC cannot be construed to be flawed given that the appellant had completed its election when it decided to pursue its claim against the third parties which turned out successful, and even finally affirmed by the Federal Court. Permitting the appellant to raise issues pertaining to the JID during the assessment proceedings would constitute a departure from the established principle that parties in civil litigation are bound by their election. Therefore, we would be inclined to the view that instead of persisting in its contention that the respondent was not entitled to the loss of the Agri-Land which was allowed by the courts, the appellant should proceed to execute its claim against the third parties.

[71] The appellant, we agree did emphasise the trite principle that the party claiming damages must prove the fact and quantum of damages. It submitted that based on the ground of the judgment of the High Court liability judgment, especially para. 51 set out earlier, properly construed, merely concluded that the appellant's actions could (instead of actually did) cause the respondent's loss of the Agri-Land. Thus, it was then incumbent on the court, subsequently, at the assessment proceedings to determine whether such actions of the appellant did cause such loss.

[72] We do not disagree that for a claim for damages the fact and quantum of damages must be proved. The respondent here, as plaintiff must therefore adduce at least sufficient evidence to enable the court to make a fair and reasonable assumption of loss. The often-quoted *dictum* of Lord Goddard CJ in *Bonham Carter v. Hyde Park Hotel* [1948] TLR 177 would be of relevance in the context, and it is worth reiterating what had been said, as follows:

> Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you give me these damages'. They have to prove it.

[73] We are also reminded of the Federal Court case of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269 where Arifin Zakaria CJ held as follows:

> [32] *It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed.* This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.

A [33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 where Lord Goddard CJ observed:*

B …

This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777.

[34] The claim by the plaintiff in the present case is for general and special
C damages arising out of breach of contract and/or negligence. Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it. (See *The Susquehanna* [1926] AC 655 and *Bolag v. Hutchison* [1905] AC 515). In the circumstances, we hold that the learned High Court Judge was right in ordering that summary judgment be
D entered on liability with damages to be assessed. (See *Dummer v. Brown and Another* [1953] 1 QB 710; *Tan Ah Chim & Sons Sdn Bhd lwn. Lim Kean Siew Dan Lain-Lain* [2000] 1 LNS 206; [2000] 6 MLJ 670).

[74] This court in *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2017] 2 MLJ 819 again summarised this
E position where it held as follows:

[51] *As to damages, it is settled law that in order for SCCSB to succeed in its claim SCCSB must show that the loss and damages is due to the breach of contract by PKNS. Once that is established, SCCSB has the additional burden of proving the damages.* The law on the recovery of damages has been succinctly
F enunciated by Ramly Ali J (now FCJ) in *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 at p 697. It may be summarised into two main principles:

(a) the burden of proof is on the party seeking the claim to prove the facts and the amount of damages (*Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); *Bonham-Carter*
G *v. Hyde Park Hotel Ltd* (1948) 64 TLR 177; *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA)); and

(b) the damages must be proved with real or factual evidence. Mere
H particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v. Leow Cheng Chiang* [1961] 1 MLJ 17 (CA)).
(emphasis added)

[75] Even more recently, the Federal Court in *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd And Another Appeal* [2021] 10 CLJ 206; [2021] 6 MLJ 619
I held that:

> [66] It is trite law that the party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr J, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 explained that in the assessment of damages for the breach of contract, the main objective is to place a party who has sustained a loss as a result of breach in the same situation as if the contract has been performed. In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with the plaintiff.

[76] Now, we reiterate that the execution of the second discharge of charge was held by the High Court to be the effective cause of the loss of the Agri-Land to the respondent, consistent with the pleaded case of the respondent. The Court of Appeal in affirming the same stated in clear and unmistakable terms thus:

> … the transfer of the Agri Land to H.Sue Ee pursuant to the 2nd SPA could not have occurred but for CIMB's breach of duty in executing the 2nd Discharge of Charge and consequentially "but for" the same Goh's loss of the Agri Land would not have occurred …

[77] In addition, we have earlier already made reference to the specific and express rulings pronounced by the High Court and the Court of Appeal on the issue of the breach by the appellant causing the loss of Agri-Land to the respondent. This plainly – and crucially – encompasses the fact of damage and the extent of which being the loss of the Agri-Land – which were as such already proved by the respondent. This means that what was still pending and left for determination at the assessment of damages proceeding was the quantum of such loss – the loss of the Agri-Land – suffered by the respondent.

[78] We would also agree with the submission of the respondent that as this court has stated in *Kemajuan Masteron Sdn Bhd v. Chong Nge Wei & Ors* [2020] 1 LNS 468 that in assessment of damages proceedings, the issue of liability to pay would no longer be in issue, such that it would only concern the quantum of damages. We should point out however that the Federal Court has recently since overruled this decision in *Chong Nge Wei & Ors v. Kemajuan Masteron Sdn Bhd* [2022] 4 CLJ 833) although not in respect of the affirmation of the said principles by the Court of Appeal.

[79] As such, despite the position taken by the appellant, based on what we have stated earlier on the specific findings of the courts in the liability proceedings, it is unequivocally plain to us that the fact of the damage – and to put it beyond doubt, in the sense that the loss of Agri-Land was due to or caused by the actions of or breach by the appellant – has already been proved in the liability proceedings. The appellant's argument on this point thus entirely fails.

A *The Quantum Of Damages*

[80] As such, the one important issue left for determination would be the quantum of the loss suffered by the respondent. Related to this is the complaint of the appellant that the respondent was not entitled to ascertain the loss of Agri-Land by reference to the valuation reports tendered at the
B assessment proceedings.

[81] We are of the view that three relevant considerations in this context ought to be briefly stated.

[82] The first is in respect of regard to market value in assessment. The loss
C here concerned a landed property. An immovable property. This court in *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461 has previously stated that in assessing damages on such a loss, comparison with an average market value of comparable properties in the vicinity of the location would be apt.

D **[83]** Secondly, for that purpose of determining the market value of the property, reference may validly be made to a valuation report prepared by a qualified valuer (see the High Court decision in *Nancy Simon SP Simon v. Peninsular Park Sdn Bhd* [2008] 10 CLJ 328).

E **[84]** And thirdly, it was held in *Lee Tai Hoo & Anor v. Lee Swee Keat & Anor* [1984] 1 LNS 44 that, generally damages or loss should be assessed at the date of the judgment, and not the date of breach of the commission of the tort. Accordingly guided by these authorities, the quantum for the loss of the Agri-Land is its market value as at the date of the judgment.

F **[85]** The submission of the appellant was that the market value assessed by the valuers of the respondent was too high. It was the stance of the former that the latter was not entitled to claim the loss of the Agri-Land given, again due to considerations on the JID against the respondent. The appellant also contended that in any event, if there was any loss payable at all, it was only
G the sum of RM478,600 paid by the respondent to the appellant pursuant to the undertaking of 14 March 2003.

[86] As mentioned earlier, the learned JC, having ruled that the appellant was not allowed to rely on the JID as issues related thereto were not pleaded in the defence and that they were in any event *res judicata* because of the
H previous specific judicial findings, awarded RM5,583,000 as damages and held that the open market value of the Agri-Land was the appropriate quantum for the loss of the respondent and the date of assessment was the date of the judgment of the High Court liability judgment on 9 November 2015.

I

[87] The respondent's case was supported by two valuation reports during the assessment proceedings, one by AJC Property Surveyors Sdn Bhd and the other, by VPC Alliance (Pg) Sdn Bhd which showed the market value of the Agri-Land on the judgment date of 9 November 2015 to be RM5,583,000 and RM5,700,000 respectively.

[88] The appellant too produced a valuation report by CH William Talhar & Wong CHW predicated on market value of the property which was recorded at the same date of judgment of 9 November 2015 to be RM5,000,000.

[89] We find no flaws in the approach taken by the learned JC of preferring the valuation reports of the respondent (and even then, the lower of the two) to that of the appellant principally by reason of the greater granularity demonstrated in the analysis of how the market value was determined in these reports, which exhibited sufficient bases with the necessary adjustments *vis-à-vis* the key considerations of date, size and location of the pertinent comparable in respect of the Agri-Land.

[90] We agree with the submission of the respondent in this regard that this would be in consonance with the decision of the Court of Appeal in *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337 which stated that in examining expert evidence, the courts should also examine the scientific grounds and facts relied on by the experts. We therefore find that the determination of the learned JC to accept the lower valuation between the two reports submitted for the respondent not to be erroneous.

[91] Similarly, the award of RM28,500 to the respondent as special damages being the costs of the valuation reports is not inconsistent with the recent decision of the Court of Appeal in *Aeon Co (M) Bhd v. Asia Plywood Company Sdn Bhd & Another Appeal* [2021] 5 CLJ 751 which allowed a claim for cost incurred in obtaining a valuation report of the property, in that case in the sum of RM99,269.

Conclusions

[92] We reiterate that at the liability stage, both the High Court and the Court of Appeal had made a specific finding that had it not been for the act of the appellant in issuing the second discharge of charge, the respondent would not have lost the Agri-Land.

[93] Thus, there is a conclusive finding at the earlier liability trial that the respondent had lost the Agri-Land due to the breach and negligence of the appellant (and for which the appellant was able to claim for indemnity and contribution from the first and second third parties).

[94] The High Court made this finding despite the issue of the JID which was not pleaded and which the appellant in this appeal now with little justification sought to rely on.

[95] In light of the judgment that the appellant was liable to the respondent for the loss of the Agri-Land, in our view, the learned JC was correct in holding that what was left for the determination at the assessment of damages, was the quantum of such loss suffered by the respondent, namely the loss of the Agri-Land.

[96] Hence the assessment is with regard to the amount of damages the respondent suffered from the loss of the Agri-Land. The learned JC was not in error in holding that the open market value of the Agri-Land on judgment date would be the appropriate quantum for the loss suffered by the respondent.

[97] As such, in light of the foregoing analysis and reasons, this appeal is dismissed with costs, and the order of the High Court is affirmed.

[98] We award cost of RM10,000 to be paid by the appellant to the respondent subject to allocator fee.